

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Telmex/Sprint Communications, L.L.C.)	
)	File No. ITC-97-127
Application for Authority under Section 214)	
of the Communications Act for Global Authority)	
to Operate as an International Switched)	
Resale Carrier Between the United States and)	
International Points, Including Mexico)	

ORDER TO SHOW CAUSE

Adopted: November 24, 1998

Released: November 24, 1998

By the Chief, International Bureau:

INTRODUCTION

1. In this *Order to Show Cause (Order)*, we have identified apparent violations of the requirements of the Section 214 authorization of Telmex/Sprint Communications, L.L.C. (TSC) to provide international switched resale services to all points, including Mexico.¹ Specifically, we have serious concerns that TSC and its affiliate, Teléfonos de México, S.A. de C.V. (Telmex), have failed to comply with certain service provisioning commitments required by TSC's authorization. We also find evidence of apparent anticompetitive conduct by TSC's affiliate that could adversely affect competition in the U.S. international services market. We therefore direct TSC to show cause within 30 days why we should not find that it has failed to comply with the conditions attached to its Section 214 authorization to operate as a reseller of switched services

¹ See Telmex/Sprint Communications, L.L.C.: Application for Authority under Section 214 of the Communications Act for Global Authority to Operate as an International Switched Resale Carrier Between the United States and International Points, Including Mexico, *Order, Authorization and Certificate*, 12 FCC Rcd. 17551 (International Bureau 1997) (*TSC Order*); Telmex/Sprint Communications, L.L.C.: Application for Authority under Section 214 of the Communications Act for Global Authority to Operate as an International Switched Resale Carrier Between the United States and International Points, Including Mexico, *Order*, File No. ITC-97-127, DA No. 98-1585 (rel. August 7, 1998) (*August Order*).

between the United States and international points.

BACKGROUND

2. On October 30, 1997, we released the *TSC Order* that conditionally approved TSC's application to provide international switched resale services² between the United States and all international points, including Mexico.³ Further, we specifically conditioned TSC's Section 214 authorization on Telmex's continued compliance with its commitment for the provisioning of private lines and private circuits to all carriers on a timely and nondiscriminatory basis in accordance with specific schedules to which Telmex and Avantel⁴ had agreed on October 10, 1997.⁵ Moreover, we required TSC to demonstrate that three conditions had been satisfied before it initiated service. Specifically, we directed TSC to show that Telmex had: (1) amended its operating agreements with U.S. carriers to implement 1/1/1 proportionate return methodology for the redistribution of southbound traffic; (2) offered U.S. carriers Paid-800 service agreements on the same terms as those offered to Sprint; and (3) offered U.S. carriers one-stop shopping on the same terms as those offered to Sprint.⁶

3. On August 7, 1998, we found that TSC had met those three preconditions to the effectiveness of the Section 214 authorization and allowed TSC to begin offering services immediately.⁷ In the *August Order*, we also addressed allegations that Telmex was engaging in anticompetitive conduct harmful to competition in the U.S. international services market. We noted that we would "continue to monitor conditions in this market closely to ensure that anticompetitive conduct by TSC does not adversely affect competition in this market." We stated that, "if we find evidence of such anticompetitive conduct, we reserve the right to impose substantial forfeitures or suspend or terminate this authorization for failure to meet the conditions

² TSC proposed to resell Sprint's facilities-based services.

³ See *TSC Order*, 12 FCC Rcd. at 17553. Several applications for review of the *TSC Order* have been filed. These applications for review are pending.

⁴ Avantel is an affiliate of MCI/WorldCom.

⁵ See *TSC Order*, 12 FCC Rcd. at 17581-83, 17591. See also Letter from Jaime Chico Pardo, Director General, Telmex, to Regina M. Keeney, Chief, International Bureau at 1 (October 28, 1997) (*Telmex Commitment Letter*).

⁶ See *TSC Order*, 12 FCC Rcd. at 17586, 17589.

⁷ *Id.* at para. 1.

of the grant."⁸

4. On November 6, 1998, MCI/WorldCom provided information indicating that Telmex is failing to comply with the condition in the *TSC Order* related to its agreement with Avantel for the provisioning of private lines and private circuits.⁹ That agreement required Telmex to meet two targets in the provisioning of Avantel's requests for private circuits and private lines for 1998. The first target required Telmex to install 95 percent of the requested private circuits and private lines in 30 days or less. The second target mandated the installation of 99 percent of the requested private circuits and private lines between 31 and 45 days. MCI/WorldCom asserts that Telmex has failed to meet both targets. With regard to the private circuits requested by Avantel, MCI/WorldCom notes that Telmex installed 38 percent within 30 days and 68 percent within 45 days; and, for private lines requested by Avantel, Telmex installed 78 percent within 30 days and 92 percent within 45 days. Thus, MCI/WorldCom states that: (1) Telmex's performance in private circuit provisioning fell short of the two targets by 57 percent and 31 percent, respectively, and (2) Telmex's performance for private line provisioning fell short of the two targets by 17 percent and 7 percent, respectively.¹⁰

5. In a letter to the Commission dated November 17, 1998, AT&T also expressed concern that TSC and Telmex are falling short of the requirements and expectations of the *TSC Order* and the *August Order*.¹¹ AT&T alleges that: (1) Mexico still does not allow "pure" switched resale; (2) Telmex has rescinded its commitment to reach the \$0.19 benchmark settlement rate with U.S. carriers by 2000; (3) Mexico continues to maintain a discriminatory 58 percent surcharge for inbound international calls; (4) Telmex remains the only carrier under Mexican law that can negotiate settlement rates with U.S. carriers; (5) AT&T has not yet been able to conclude an agreement with Telmex for recalculating proportionate return payments to reflect a retroactive effective date of January 1996 for Paid-800 services; and (6) Telmex is engaging in discriminatory conduct with respect to received collect traffic.

DISCUSSION

⁸ *Id.* at para. 19.

⁹ See Letter from Kenneth A. Schagrin, Associate Counsel, International Regulatory Affairs, Law and Public Policy, MCI Communications Corp., to Diane J. Cornell, Chief, Telecommunications Division, International Bureau, FCC (November 6, 1998) (*MCI/WorldCom Letter*).

¹⁰ *Id.* at 4-7.

¹¹ See Letter from Lawrence J. Lafaro, General Attorney, AT&T, to Magalie Roman Salas, Secretary, FCC (November 17, 1998) (*AT&T Letter*).

6. After examining the information filed by MCI/WorldCom and AT&T, we have serious concerns that TSC and its affiliate may be violating certain conditions of TSC's Section 214 authorization to provide international switched resale services to all points, including Mexico. In particular, we find that Telmex may be delaying the provisioning of private lines and private circuits to Avantel and other competitors in violation of a condition imposed in the *TSC Order*. As we stated in the *TSC Order*, Telmex has the ability and incentive to discriminate against its competitors serving the U.S.-Mexico route by "fulfill[ing] its own circuit orders while delaying the delivery and installation of private circuits to its competitors."¹² We noted that "by engaging in this form of discriminatory conduct, Telmex could stifle competition along the U.S.-Mexico route."¹³ We reiterate, as the Commission has in related contexts,¹⁴ that provisioning requirements go to the heart of a new entrant's ability to compete with a dominant carrier. Thus, we direct TSC to show cause why we should not conclude that TSC is in violation of the *TSC Order*'s condition on the provisioning of private lines and private circuits.

7. We are also concerned that Mexico has not lived up to certain expectations set forth in the *TSC Order*. First, we stated in the *TSC Order* our expectation that Mexico would allow "the provision of 'pure' switched resale services in the near future."¹⁵ We based this conclusion in part on TSC's representation that resale regulations would be published, and resale

¹² See *TSC Order*, 12 FCC Rcd. at 17583.

¹³ *Id.*

¹⁴ For example, the Commission, in a series of orders implementing Section 271 of the Communications Act of 1934, as amended, consistently emphasized the critical importance of providing new entrants access to an incumbent carrier's network elements and resale services in order to ensure that all carriers are able to compete fairly for customers. See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, 12 FCC Rcd. 20543 (1998). Similarly, with respect to the *Bell Atlantic/NYNEX merger*, the Commission concluded that the carrier's voluntary commitment to provide new entrants with access to its facilities addressed alleged anticompetitive harms resulting from the proposed merger. See Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985 (1997) (*Bell Atlantic/NYNEX merger*). By contrast, failure to provide new entrants with access to the incumbent's network elements and resale services on a reasonable and nondiscriminatory basis has resulted in rejection of the incumbents' applications to provide interLATA service. In a recent decision, the Commission noted that 97 percent of BellSouth's residential orders and 81 percent of its business orders flowed through (*i.e.*, did not require manual intervention), but only 25 to 54 percent of its competitors' orders flowed through. For these and other reasons, the Commission denied BellSouth's application to provide interLATA service in Louisiana. See Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, *Memorandum Opinion and Order*, 13 FCC Rcd. 6245 (1998).

¹⁵ See *TSC Order*, 12 FCC Rcd. at 17561.

permits granted, in the near future. We also noted Mexico's specific commitment to the World Trade Organization's Agreement on Basic Telecommunication Services to open its market to allow resale services.¹⁶ We understand, however, that Mexico still has neither issued any switched resale regulations nor given any resale permits.¹⁷ We therefore direct TSC to provide us within 30 days information it or its affiliate, Telmex, has on the status of the adoption of regulations to allow "pure" switched resale competition in Mexico.

8. In the *TSC Order*, although we noted our concern about the ability of Telmex to cross-subsidize its international long distance services to the detriment of competition on the U.S.-Mexico route,¹⁸ we found that the prohibition against cross-subsidization contained in Mexico's Federal Telecommunications Law, in conjunction with the anticipated implementation of new cost allocation rules, should provide adequate protection against anticompetitive behavior. We stated, however, that we remained concerned about the potential for cross-subsidization and would continue to monitor developments on this issue. More than a year has passed since the *TSC Order* was issued and Mexico still does not have cost allocation rules in place aimed at preventing Telmex from cross-subsidizing its international long-distance services. We therefore direct TSC to provide us within 30 days information it or its affiliate, Telmex, has on the status of the adoption of cost allocation rules and other safeguards, if any, to prevent cross-subsidization.

9. We are also concerned about the lack of progress in accounting rate negotiations between Telmex and AT&T, MCI/WorldCom and other U.S. carriers. Telmex and Sprint, its joint venture partner, negotiated a settlement rate agreement that would provide for average settlement rates of \$0.375 effective January 1, 1998; \$0.345 to become effective January 1, 1999; and \$0.19 to become effective January 1, 2000. In the *Sprint Modification Order* adopted today, we approved the \$0.19 settlement rate but found that the interim settlement rates of \$0.375 and \$0.345 were not in the public interest because they make inadequate progress toward achieving cost-based settlement rates and because we are concerned that Telmex is whipsawing U.S. carriers in its accounting rate negotiations.¹⁹ AT&T and MCI/WorldCom have attempted to negotiate interim rates that are lower than the \$0.375 and \$0.345 interim rates in the Sprint agreement. Their efforts have not been successful, however, because Telmex has exerted substantial pressure on AT&T and MCI/WorldCom to accept the same interim rates for 1998 and

¹⁶ *Id.* See also WTO Doc. No. GATS/SC/56/Suppl. 2 (April 11, 1997).

¹⁷ See *AT&T Letter* at 2-3.

¹⁸ See *TSC Order*, 12 FCC Rcd. at 17566.

¹⁹ See Sprint Communications Company, L.P.: Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico, *Memorandum, Opinion and Order*, ISP 97-M-708, DA 98-2401 (rel. November 24, 1998) (*Sprint Modification Order*).

1999 agreed to by Sprint.²⁰ In addition, AT&T has filed information with the Commission that suggests that Telmex is retreating from its commitment to introduce a \$0.19 settlement rate effective January 1, 2000.²¹ We are concerned that Telmex's negotiating tactics, in particular its refusal to negotiate lower interim settlement rates with AT&T and MCI/WorldCom, and its alleged threat of retreat from the \$0.19 settlement rate, are an attempt by Telmex to use its market power to extract concessions from unaffiliated U.S. carriers. Such a use of market power would constitute further evidence of anticompetitive behavior by Telmex.

10. Our concern that Telmex is engaging in anticompetitive behavior in its accounting rate negotiations with U.S. carriers is exacerbated by the fact that, under Rule 13 of the regulations issued by Mexico's Secretariat of Communications and Transport, Telmex negotiates accounting rates for all Mexican carriers.²² As a result, Telmex has *de jure* monopoly power in its negotiations with U.S. carriers. In the *TSC Order*, the Commission noted that Rule 13 inhibits competition on the U.S.-Mexico route and limits the potential for achieving settlement rates that are closer to the cost of terminating international traffic.²³ We believe that these effects of Rule 13 are demonstrated by Telmex's refusal to negotiate lower interim rates with AT&T and MCI/WorldCom.

11. In addition, we remain troubled by Mexico's 58 percent surcharge for inbound international calls. We believe this surcharge unfairly benefits Telmex over new competing facilities-based international carriers. In the *TSC Order*, we expressed our misgivings about this surcharge because it "results in Telmex paying itself 58 percent of the settlement rate for each minute of inbound international traffic, while competitors must turn over that 58 percent to Telmex."²⁴ "[O]ur expectation that it will be phased out and soon eliminated [contributed to our finding] that grant of TSC's application [was] in the public interest," despite the existence of the

²⁰ See AT&T Reply to Sprint Opposition, ISP-97-708 (filed January 13, 1998) at 2-3.

²¹ See AT&T Opposition to Sprint Waiver, ISP-97-708 (filed December 3, 1997) at 8 (citing Telmex letter that expressly reserves the right to reconsider its agreement to the \$0.19 rate if the Commission requires U.S. carriers to pay other interim rates than those in the agreement between Sprint and Telmex or if U.S. carriers make payments at other rates).

²² Rule 13 provides that the long distance carrier that has the largest percentage of the market on a given route during the previous six months is the carrier that negotiates settlement rates on that route. See Secretariat of Communications and Transport, Rules to Provide Long Distance International Service Applicable to Duly Authorized Concession Holders, Diario Oficial, December 11, 1996, p. 40.

²³ See *TSC Order*, 12 FCC Rcd. at 17587.

²⁴ *Id.* at 17584.

surcharge at the time we released the *TSC Order*.²⁵ We reserved the right in the *TSC Order*, however, to revisit this issue and take appropriate steps if Mexico failed to eliminate the surcharge in the near future.²⁶ We therefore direct TSC to provide to us within 30 days information it or its affiliate has on the status of the phasing out or elimination of the 58 percent surcharge.

12. We are also concerned that pending matters relating to Paid-800 service have yet to be resolved. Prior to the release of our *August Order*, Telmex agreed to offer such service to all U.S. carriers starting with the same effective date it provided Paid-800 service with Sprint.²⁷ We therefore found that Telmex had satisfied the condition of the *TSC Order* that Telmex offer all U.S. carriers Paid-800 service agreements on the same terms as those offered to Sprint. We instructed the parties to report back to us on the final arrangements that had been negotiated.²⁸ We now understand that AT&T and MCI/WorldCom still have no final Paid-800 agreement with Telmex. Moreover, we understand that the "true up" arrangements relating to the inclusion of Paid-800 service in proportionate return retroactive to January 1996, the date Telmex commenced this service with Sprint, have not been finalized. We direct TSC to report back to us within 30 days on the progress made between Telmex and U.S. carriers to resolve these Paid-800 service matters. We also expect AT&T and MCI/WorldCom to file information within 30 days informing us of the status of these matters.

13. Finally, we have concerns that TSC may be in violation of the Commission's International Settlement Policy and "no special concessions" requirements, the applicability of which we specifically reiterated in the *TSC Order*.²⁹ For example, AT&T asserts that Telmex is engaging in discriminatory conduct with respect to received collect services.³⁰ AT&T reported that, beginning in June 1997, it experienced significant declines in its received collect traffic from Telmex at a time when its received collect traffic from another carrier in Mexico remained relatively constant.³¹ Since October 1997, AT&T estimates that its received collect traffic from Telmex has dropped by 70 percent. We direct TSC to provide us within 30 days information

²⁵ *Id.* at 17585.

²⁶ *Id.*

²⁷ *See August Order* at para. 10.

²⁸ *Id.* at para. 11.

²⁹ *See TSC Order*, 12 FCC Rcd. at 17579-80.

³⁰ Received collect service refers to collect calls made from Mexico to the United States where the recipient is billed for the call.

³¹ *See AT&T Letter* at 8.

about traffic flows or arrangements between its affiliate, Telmex, and U.S. carriers that could explain the significant change in received collect traffic on the U.S.-Mexico route.³²

ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i), 201, 214, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 214, 303(r) and 403, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Telmex/Sprint Communications, L.L.C. (TSC) SHALL SHOW CAUSE within 30 days of the release of this *Order* why we should not find that it and its affiliate, Teléfonos de México, S.A. de C.V., have failed to comply with the conditions attached to its Section 214 authorization to provide international switched resale services to all international points, including Mexico.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney, Chief
International Bureau

³² *August Order* at para. 19.